ad L

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 2

ARDSLEY BUS COMPANY INC.
a/k/a GENE'S BUS COMPANY,

Respondent

and

TRANSPORT WORKERS UNION OF GREATER NEW YORK, LOCAL 100, AFL-CIO,

Charging Party.

Case Nos. **2-CA-38713**
2-CA-39049
2-CA-39376
2-CA-39467

RESPONDENT'S REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF

LAW OFFICES OF ANTHONY J. PIRROTTI, P.C.
Attorneys for Respondent
501 Ashford Avenue
Ardsley, New York 10502
(914) 693-8000

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES iii

BRIEF COUNTER-STATEMENT OF FACTS 1

A. The Union's Anti-Semitic Behavior Now Becomes a "Publicity Campaign" 1

B. Uchofen's Suspension was Justified by His Utter Disregard For the Employer's Rules and Regulations Regarding Company Van Privileges 2

C. The General Counsel Is Compelled to Admit That the Employees Wanted to Oust the Union and Speciously Answers That the Employer Was Responsible for the Employees' Disaffection, With Absolutely No Support in the Record 3

D. The Petitioner Violated Her Statutory and Her Ethical Duty by Withholding the Affidavits She Obtained from Maceira and Wade Which Showed That the Employees Wanted the Union Out as Early as October 2007 4

E. The Alleged Witness To the Alleged Assault Which Simply Never Happened .. 5

F. Respondent Never Admitted That It Did Not Post All Routes During The August 2008 Route Picks 6

ARGUMENT 6

POINT I 6

THE ALJ HELD THAT THE EVIDENCE WAS INCONCLUSIVE THAT RESPONDENT WAS ENGAGED IN INTERSTATE COMMERCE 6

POINT II 7

RESPONDENT PROPERLY WITHDREW RECOGNITION FROM THE UNION 7

A. *Master Slack* Confirms That In Order To Show A Causal Connection Between The Alleged Unfair Labor Practices And The Petition to Decertify There Must Be A Nexus Which Has Not Been Shown By The Petitioner 8

POINT III 9

UNDER THE HOLDING OF *MULLICAN LUMBER* THE PETITIONER VIOLATED HER ETHICAL AND STATUTORY DUTY BY WITHHOLDING EVIDENCE THAT THE EMPLOYEES WANTED THE UNION OUT AS EARLY AS OCTOBER 2007 9

CONCLUSION 10

TABLE OF AUTHORITIES

Administrative Cases:

Consolidated Bus, 350 NLRB 364 (2007) 7

Lee Lumber, 322 NLRB at 177. . . . . 3, 7

Levitz Furniture Company of the Pacific, 333 NLRB 717, 723 (2001) 7, 9

Master Slack, 271 NLRB at 84 8

NLR.B v. B.A. Mullican Lumber, 535 F.3d 271 (4th Cir. 2008) 4, 9

BRIEF COUNTER-STATEMENT OF FACTS

The function and purpose of a Statement of Facts is to point out the facts that are found in the record. Unfortunately, the General Counsel chose to cite facts which are not only dehors the record but in many critical instances, distorts the testimony of his witnesses.

A. The Union's Anti-Semitic Behavior Now Becomes a "Publicity Campaign"

The General Counsel offers no facts to explain the devastating effect that the anti-Semitic conduct had on the employer.

> JUDGE: Can you describe the rat?
> THE WITNESS (Gillison): **Yes. It was a big, blown up balloon with a generator blowing this thing up.**
> JUDGE GREEN: Yes. I've seen them.
> THE WITNESS: **And they tied some kind of a notice around it telling him some kind of name with his name onto it, saying that he was this. And it had my name on it. But I don't care about my name.**
>
> * * *
>
> A. **I believe it was "Gideon Tiktin is Scrooge and Tom Gillison," something else.** I forgot. **But two of the Christmas figures of whatever. Scrooge and somebody else. But I remember that with them. But I found it despicable.**

(Tr. 353-354; Emphasis added)

The General Counsel speciously answers the ALJ's finding that the Union was engaged in anti-Semitic conduct used by the Nazis to persecute Jews by depicting them as rats by claiming that the Union was engaged in a "publicity campaign." *(GC Answering Brief pg. 2)* The Union's anti-Semitic behavior described by the General Counsel as a "publicity campaign" was used not once but twice in his Statement of Facts. The term "publicity campaign" is nowhere found in the record and is the General Counsel's creation. It is simply outrageous and is an insult to the memory of six million Jews who died because of the Nazis anti-Semitic pogrom. *(ALJ p. 9:8 fn. 5)* The words of the ALJ are:

> "For whatever it is worth, I note that Tiktin is Jewish and that the portrayal of Jews as rats was a stereotype utilized by the Nazi regime in Germany." *(ALJ p. 9:8 fn. 5)*

B. Uchofen's Suspension was Justified by His Utter Disregard For the Employer's Rules and Regulations Regarding Company Van Privileges

The Employer's Company Policy clearly states that "[t]here is absolutely no personal use of company vehicles at anytime for any reason." *(GC Exh. 9)* There is absolutely no excuse offered by Uchofen at the hearing as to why the company van was parked in front of the Union headquarters. Furthermore, Uchofen clearly failed to tell his Employer about the parking ticket he had received while at the Union office. *(Tr. 375)* Uchofen's failure to inform his Employer of the ticket and in effect ignoring the ticket, resulted in the fine being doubled at the expense of the Employer. *(Tr. 375)* Uchofen was in fact suspended for his misuse of the company vehicle. *(Tr. 370-375)* Uchofen's disregard for the Employer's rules and regulations regarding the company van take home privileges demeaned the Employer's authority among his employees.

Moreover, Uchofen's attempt to involve Simino, a Union representative who had already exhibited disturbing anti-Semitic conduct in the work place, was but another opportunity for the Simino to further degrade the general manager amongst his employees. Simino was successful in making a scene at the company office when Gillison was forced to call the police when Simino refused to leave his office. *(GC Exh. 12 ¶ 13)* The ALJ also agreed that Gillison was justified in calling the police by stating "[i]n this particular case, it is my opinion that Gillison was within his rights to call the police when Uchofen and Simino insisted on remaining in his office after being asked to leave." (ALJ 12:38-40)

C. **The General Counsel Is Compelled to Admit That the Employees Wanted to Oust the Union and Speciously Answers That the Employer Was Responsible for the Employees' Disaffection, With Absolutely No Support in the Record**

After listening to the overwhelming testimony that the employees were so dissatisfied with their Union, the ALJ held:

> **I do note, however, that there is little or no credible evidence that management played any direct or indirect role in the solicitation of the petition.**

(ALJ 34:14-15; Emphasis Added)

The General Counsel acknowledges in his Answering Brief, as he must, that "there must be specific proof of a causal relationship between the alleged unfair labor practice and the ensuing events indicating a loss of support. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996). Nowhere in the General Counsel's Statement of Facts does he cite any testimony by an employee to causally relate the alleged unfair labor practices to the possibility of their detrimental or lasting effect on employees, any possible tendency to cause employees' disaffection from the Union, or the effect of unlawful conduct on employee morale, organization, activities, and membership in the Union. *Id.* In fact, Simino, the Union organizer, could not name one employee who had objected to any of the alleged unfair labor practices regarding the picks:

> JUDGE GREEN: All right. But then -- but, that's what the -- **unfortunately or fortunately, that's what this case is about. So, you have to tell me the names of individuals who personally complained about that their seniority rights were abused as a result of the -- any of the picks.**
> THE WITNESS: I have a problem naming them in front of the Employer.
> JUDGE GREEN: **Okay. Then, I'm going to conclude that there were none.** *(Tr. 708-710)*

The General Counsel's Statement of Fact also fails to answer Respondent's Exceptions Brief which set forth as facts that it was the Union's conduct that caused the Petition to Decertify based

on the oppressive hikes in the employees' Union dues and their wish that they wanted another Local to represent them to protect their rights. *(See R Exh. 6a & 6b; See also R Exceptions Exh. B - Michael Wade's Affidavit)*

D. The Petitioner Violated Her Statutory and Her Ethical Duty by Withholding the Affidavits She Obtained from Maceira and Wade Which Showed That the Employees Wanted the Union Out as Early as October 2007

The General Counsel does not deny that he improperly objected to any inquiry by the Respondent into the pre-Complaint investigatory process and that he violated her ethical and statutory duty as set forth in *NLRB v. B.A. Mullican Lumber*, 535 F.3d 271 (4th Cir. 2008). The Respondent attempted to introduce into evidence the two confidential sworn statements obtained by the Petitioner from employees, Luis Maceira and Michael Wade, which were attached as Exhibits "A" and "B" to Respondent's Exceptions. *(Tr. 479-480)* Maceira averred that the Union representatives were causing problems for the employees and as a result he asked other employees to sign a petition to get the Union out: "I think it was in or close to October of 2007." *(See R Exceptions Exh. A - Luis Maceira Affidavit ¶ 2)* The General Counsel was also informed that Mr. Maceira never spoke to management about the circulation of a petition. *(R Excep. Exh. A ¶ 3)*

General Counsel was also aware from the signed statement obtained from Michael Wade that he and other employees attempted to find another Union, Local 713, to represent them and that Local 713 was willing to provide substantial medical insurance benefits and reasonable Union dues. *(R Excep. Exh. B ¶ 3 & 4)* The Petitioner was also aware that the employees resented that the charging parties' dues were going up just about every month or so. *(R Excep. Exh. B ¶ 5)* General Counsel inquired about the meetings with Local 713 and knew of the date, time and place of each meeting, as well as the names of the people who attended the meetings. General Counsel was also aware of the charging parties' attempt to disrupt the meeting with Local 713. *(R Excep. Exh. B ¶ 9)* The

General Counsel was fully aware that the employees wanted another Local to represent them who would better represent their interests and furthermore they wanted another Local who would not be raising their dues as abruptly and capriciously as their Union had done.

E. <u>The Alleged Witness To the Alleged Assault Which Simply Never Happened</u>

The General Counsel further insists on distorting the record when he alleges that Mr. Gillison assaulted the shop steward by kicking him, when the very witness whom the General Counsel called to testify as to the alleged physical assault stated:

> Q. **Did you see any interaction between Cesar and Tom in November of 2008 at Ardsley that seemed unusual to you?**
>
> * * *
>
> A. **<u>No. I just heard commotions.</u>**

(Tr. 1104; Emphasis added)

General Counsel argument that the ALJ had not made a determination that Uchofen lacked credibility is belied by the fact that in the Order Regarding Proposed Amendments to Complaint the ALJ had dismissed one of General Counsel's amendments based on the possibility that the new allegation might have been a "recent fabrication" by Uchofen:

> The General Counsel proposes to amend the Complaint to allege that in October 2008, Elisa Arias told Cesar Uchofen that he was not getting charter or other extra work "because he is a union person." **Apart from the possibility that his testimony on this point might be a recent fabrication,** [footnote omitted] **this allegation has not been fully litigated and the Respondent would have the right to further cross examine Mr. Uchofen about this issue and to present Elisa Arias or other persons to testify about the alleged transaction.**

(GC Exh. 115; Emphasis added)

In point of fact, the recent fabrication by Mr. Uchofen undoubtedly goes against his character and his credibility as a witness. In effect, this was but another way in which the new Union

representatives continue to do whatever they could to destroy the Employer and his business.

F. Respondent Never Admitted That It Did Not Post All Routes During The August 2008 Route Picks

General Counsel was aware from the confidential statements obtained from Gillison, Maceira and Wade that all routes were posted and picked in accordance with seniority and blind sided the Respondent by objecting to their own witnesses' statements. *(GC Exh. 25)* The Union representative John Simino could not identify one single employee to corroborate his testimony. *(Tr. 708-710)*

General Counsel again misstates the record when he asserts on page "30" of his Answering Brief that Respondent allegedly admits in Gillison's August 28, 2008 letter that drivers and monitors were picked without regard to seniority and the bidding procedure by not posting all available routes. In fact, in his August 28th letter, Mr. Gillison stated:

> ...**there were no routes closed off the pick. All Irvington, Dobbs Ferry and Westchester County routes were posted on the board with all other contract routes during the entire route pick.**

(GC Exh. 25; Emphasis added)

ARGUMENT

POINT I

THE ALJ HELD THAT THE EVIDENCE WAS INCONCLUSIVE THAT THE RESPONDENT WAS ENGAGED IN INTERSTATE COMMERCE

After all of the evidence was submitted by both sides on the issue of jurisdiction, the ALJ held:

> JUDGE GREEN: ...**I'm not making any conclusion about it one way or the other, other than receiving it as a piece of paper that's signed by your client. So that's all I'm doing.**

(Tr. 32-33; Emphasis added)

The General Counsel fails to point out to this Honorable Board any facts which surfaced after the ALJ ruled that the evidence that he submitted was inconclusive. There was no evidence that would cause the ALJ to change his use of the word "inconclusive" to "conclusive"; hence the General Counsel failed to meet the Respondent's Affirmative Defense of lack of jurisdiction.

Moreover, General Counsel confuses "purchases" with "services" that are rendered by the Respondent. Thus, General Counsel cites *Consolidated Bus,* 350 NLRB 364 (2007) and states that the Board accepted jurisdiction "based on gross revenue exceeding $250,000 and purchases exceeding $5,000 from out-of-state entities." *(GC Answering Brief pg. "6")* However, the record is bare of any alleged purchases exceeding $5,000 from out of state entities. The only reference to a dollar amount is $4,000 from services rendered outside the State of New York which is not a synonymous term with "purchases". Not only are services not encompased in the word "purchase", but in any event, those services are at a *de minimus* cost basis of $4,000. Therefore, this Board should not exercise jurisdiction.

POINT II

RESPONDENT PROPERLY WITHDREW RECOGNITION FROM THE UNION

General Counsel admits that the employer can establish loss of majority support by an anti-union petition. It is undisputed that the anti-Union petition signed by 193 out of 220 employees was admitted into evidence without an objection. Respondent clearly showed it met his *prima facie* case by submitting a Decertification Petition signed by the majority of its employees. In fact, the General Counsel concedes and cites *Levitz Furniture Company of the Pacific,* 333 NLRB 717, 723 (2001).

General Counsel then cites *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 stating that "there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." The record is absolutely barren of any

testimony by any of the 220 employees who claimed that the alleged unfair labor practices testified to by the Union's representatives had any relationship with their signing the Petition to Decertify.

A. *Master Slack* Confirms That In Order To Show A Causal Connection Between The Alleged Unfair Labor Practices and The Petition to Decertify, There Must Be A Nexus Which Has Not Been Shown By The General Counsel

The holding in *Master Slack*, 271 NLRB 78 (1984) cited by the Petitioner, confirms in all respects that the Respondent had an absolute right to withdraw recognition from the Union once the majority of employees had rejected the Union. The Board sustained the ALJ's finding that there was no causal relation between the alleged unfair labor practice and the Petition to Decertify.

As in the case at bar, the General Counsel in *Master Slack* argued that the causal relationship between the alleged unfair labor practices and the signing of the Petition was demonstrated as a matter of law. However, in *Master Slack* 271 NLRB at 84, the General Counsel proffered this same argument unsuccessfully with the Board holding:

> The General Counsel contends, in effect, that the causal relationship is demonstrated as a matter of law by virtue of the continued impact of the unremedied unfair labor practices in light of the background of flagrant and serious unfair labor practices. That argument begs the question.

Using the standard set forth in *Master Slack,* the ALJ held:

> It surely must be concluded that there is no direct evidence of a causal relationship between Respondent's unlawful conduct of 1973-1974 and the 1982 petition. Moreover, I further conclude that the indirect factors are insufficient here to operate as a matter of law to preclude Respondent from withdrawing recognition.

Id. at 85

In the event that the allegations are found to be violations, there is no direct evidence of a casual relationship between the Respondent's unlawful conduct and the decertification petition signed by 193 out of 220 dissatisfied employees.

POINT III

UNDER THE HOLDING OF *MULLICAN LUMBER* THE PETITIONER VIOLATED HER ETHICAL AND STATUTORY DUTY BY WITHHOLDING EVIDENCE THAT THE EMPLOYEES WANTED THE UNION OUT AS EARLY AS OCTOBER 2007

The General Counsel objected to the introduction of evidence to show that the Petitioner was biased in favor of the Union and refused to conduct an impartial investigation by, *inter alia*, withholding evidence in her possession that the Union no longer had majority support[1]. Furthermore, the General Counsel was aware from her pre-Complaint investigation that the employees wanted the Union out as early as October 2007 from her interview with Maceira. *(R Excep. Exh. A* ¶ 2) The issue of whether the General Counsel had the right to deny discovery into the events surrounding the presentation of the petition was reviewed by the Court in *NLRB v. B.A. Mullican Lumber*, 535 F.3d 271 (4th Cir. 2008):

> While their new standard of *Levitz* does not relieve the employer of presenting objective evidence as to the actual loss of majority support, it does impose on the General Counsel additional duties, ethical and statutory, when the issue is presented to the Board and the courts. **It would be improper for the General Counsel, if he had in his possession evidence that a union no longer had majority support, to urge a court of appeals to enforce a bargaining order against the employer requiring the employer to bargain with a union representing only a minority of the employees.** In doing so, he would be seeking unlawful relief that would not only erode the fundamental policies of the Act but would also violate his duties under the Act. The supreme Court has noted that the Board's principal duty is to advance the congressional policy for industrial peace accomplished by "promo[ting] stability in collective-bargaining relationships, *without impairing the free choice of employees.*"

(Id. at 228)

[1] It is respectfully pointed out to this Board that the General Counsel was in violation of Rule 3.4(a)(3) of the Rules of Professional Conduct which states "a lawyer shall not conceal or knowingly fail to disclose that which the lawyer is required by law to reveal".

General Counsel's baseless conclusion that there was no bias in the pre-Complaint investigation is belied by the statements that were obtained from Maceira and Wade and the statement from the employee Reynaldo Gomez that they wanted the Union out and wanted another local to represent them. *(See R. Excep. Exh. A & B, and R.Exh. 8 respectively)* Try as they might, the General Counsel could not produce one employee to show that the allegations made by the Union had any basis in fact. The General Counsel also failed to rebut the Respondent's argument that the ALJ was biased in his rulings by unilaterally and without basis in fact or law refused to hear any testimony to show the General Counsel's failure to conduct a fair and impartial investigation.

CONCLUSION

General Counsel's objection to oral argument speaks for itself. The Respondent requests that oral argument be granted and that this Honorable Board, after hearing Respondent's argument, dismiss the Complaint in all respects.

Dated: Ardsley, New York
April 29, 2010

Yours, etc.,

ANTHONY J. PIRROTTI, ESQ.
LAW OFFICES OF ANTHONY J. PIRROTTI P.C.
Attorneys for Respondent
501 Ashford Avenue
Ardsley, New York 10502
(914) 693-8000

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) S.S.

ANNE K. BRACKEN, being duly sworn, deposes and says:

I am not a party to the action, am over the age of eighteen (18), and reside at Stormville, New York.

On **May 3, 2010,** I served the within **RESPONDENT'S EXCEPTIONS AND SUPPORTING BRIEF** by depositing a true copy thereof, enclosed in a FEDERAL EXPRESS wrapper addressed as shown below, into the custody of FEDERAL EXPRESS, for overnight delivery, prior to the latest time designated by the service for overnight delivery, addressed to each of the following persons at the last known address set forth after each name:

TO: ALLEN M. ROSE, ESQ. & COLLEEN BRESLIN, ESQ.
Counsel for the General Counsel, National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614, New York, New York 10278

DENIS ENGEL, ESQ.
COLLERAN, O'HARA & MILLS, LLP
1225 Franklin Avenue, Suite 450
Garden City, New York 11530

Anne K. Bracken
ANNE K. BRACKEN

Sworn to before me this
3rd day of May, 2010

Notary Public

NICOLE M. MURDOCCA
Notary Public, State of New York
No. 01MU6213666
Qualified in Westchester County
Commission Expires Nov. 9, 2013